Comments on the 2023 draft merger guidelines

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17 September 2023

The US Merger Guidelines are long overdue for a revision both because of strong evidence that there has been underenforcement of anticompetitive mergers for decades, and because there have been significant changes in the economy that have altered market realities, and these require different enforcement techniques and accompanying guidance. A paper Steve Salop and I wrote in 2020 described possible reforms to the guidelines that are strongly justified by economic theory and empirical evidence and would help prevent anticompetitive mergers. I am fully supportive of an effort by the Agencies to strengthen enforcement.

The main purpose of Merger Guidelines is to offer the competition community – business executives, antitrust lawyers, courts, and enforcement staff – a clear and simple explanation of competition concepts. Courts in particular need help analyzing antitrust topics they do not see very often. Guidelines will be most useful to judges, and therefore most powerful in affecting the outcome of antitrust cases, if they stay as clear and simple as possible. In addition, a clear and simple document is more accessible to the people whose lives will be affected by the exercise of market power caused by anticompetitive mergers. A reorganization of the material in the draft guidelines into three separate documents, as I explain below, will achieve these goals.

I. The 'turducken'

The new draft Merger Guidelines contain a great deal of much-needed and updated economic analysis. And the changes in the economic analysis in this new version of the guidelines are fully justified by the progress of the economics discipline as well as evolution of the economy. A few comments on how the economics might be improved form the second half of this article. However, as a complete document, the draft currently presents itself like a "turducken" that is neither tasty nor elegant.

A "turducken" is a chicken inside a duck inside a turkey, which is then all cooked together. The draft puts a well-crafted description of economic analysis (the chicken) inside a legal brief (the duck) which is in turn wrapped in a set of goals (the turkey). Like the dish – at least in my view – the combination enhances none of its elements, even if each one standing alone would be delicious. I encourage the agencies to unpack the turducken and publish three separate documents which serve three different purposes.

The legal argument

The legal brief found inside the draft has, as its goal, to convince the reader that US courts have generated good law that can be used to enforce against anticompetitive mergers. The leadership of the agencies have stated publicly that they follow existing law. In the US legal system, this necessarily includes following past court decisions founded on good economic analysis as well as those that made mistakes. It is widely understood that today's competition problems have been driven to a significant degree by previous merger decisions that did not recognize risks of harms to competition. Those courts did not follow best practices when it came to assessing the facts and identifying potential harms from a merger, and their reasonings are unfortunately now part of the law.

The difficulty the legal drafters face is two-fold. First, it is awkward to intersperse a legal brief among text that is clear and succinct economic analysis. The second problem is the difficulty of situating the

economic analysis among carefully selected legal decisions given that the agencies do not want to follow the many decisions that make mistakes. Therefore, the legal argument is constructed to duck and weave around unsound opinions as it tries to fit itself into the economic narrative. These constraints weaken what might otherwise be an interesting and compelling legal brief.

Happily, there is a simple and proven way to emphasize the correct *and* avoid giving credence to the incorrect: write merger guidelines that are based primarily on proven economic principles and contain minimal citations to legal opinions. The logic of the economics-based guidelines shows how to arrive at the right answer, one that protects consumers from the risk of lessened competition and is consistent with the controlling case law. At the same time, sound opinions are supported because they match the reasoning in the guidelines, while, upon inspection, unsound opinions are exposed as illogical. Indeed, sophisticated guidelines are crafted to make these conclusions self-evident even to a generalist judge who has not previously handled an antitrust case.

The footnotes to court decisions and quotes from them that occur throughout the draft create the impression that the economic conclusions therein depend on those legal decisions. Economic principles and progress in the field come from economic scholars, not from courts. The authors may not have meant for the footnotes to serve as justifications for pieces of economic analysis, but using footnotes in any other way in a legal document is highly transgressive. Law students learn to support every claim in a brief. For example, where the text says that gravity will cause the apple to fall to the ground, the author is obliged to insert a footnote to Newton. Proof is what footnotes are used for in law.[1] However, attorney consumers of the draft merger guidelines - a not inconsiderable share of readers and judges - will instinctively view each footnote to a legal opinion as proof of the relevant claim. Specialist attorneys will know perfectly well that there are many other opinions not cited in the guidelines that can be used to justify anticompetitive mergers for one reason or another. Such readers, and perhaps courts also, will view the document as cherry-picking only favorable cases. They may conclude that the Merger Guidelines document is a piece of advocacy, or the kind of argumentation suitable for a law review article, rather than an expression of empirically supported economic knowledge.

The goals of enforcement

Lastly, the legal brief containing the economic analysis is stuffed inside a wrapper of goals disconnected from the benefits to real people. These non-people-centered goals form a framework for the content, but that framework does not match the underlying economic ideas, which weakens the overall document. The goals that conflict with people-centered enforcement include: prevention of industry evolution, a desire to invoke abstract benefits of competition without being specific, a policy against vertical integration generally, and a focus on concentration as a goal rather than outcomes that would help consumers and workers. These constraints make it difficult to write clearly about economic analysis.

More importantly, the draft lacks drive and moral force because it does not present and explain the overriding point of merger enforcement: *protection of people from the exercise of market power which causes them harm, whether through increased prices of outputs, lower prices of inputs, or reduced quality or innovation*. The text refers to competition constantly, even though it never says *why* as a society we want competition. Educating readers, particularly judges, about the ultimate goal of competition enforcement is critical to setting them on the right analytical path. Capitalism does not benefit the people unless there are rules of the road that force firms to deliver value to consumers instead of keeping it as profit. Senator Warren put it this way, “I believe in capitalism… But capitalism without rules is theft… that’s not competition in the marketplace. That’s not producing consumer surplus.” This sentiment is what

[1] In economics, by contrast, the text contains the argument, while footnotes are used for details not of general interest.

gives competition enforcement its energy. Without it, guidelines sound clinical and abstract, and the importance of the enterprise is harder to appreciate. A rule protecting competition between firms is one of the most effective ways to generate lower prices, higher quality, and more innovation for the people. It also protects their income by insuring competition for workers and other inputs.

The draft refers repeatedly to the risk of harm to competition. If the document is meant to be accessible to non-specialist readers it might want to address *why* a reader should be worried about harm to competition. Whether the reader of the draft is a consumer who prefers low prices or a worker who prefers higher wages, they both might like to learn about that specific outcome - which competition delivers - and might also like to learn about the increased quality and innovation they will experience in more competitive markets. These outcomes are the standard goals of antitrust enforcement, but they first appear in the draft only on page 8, and only then inside Guideline 2, rather than as an overarching fundamental goal. Omitting a list and explanation of the outcomes of competitive markets that are being served by merger enforcement hurts the clarity of the document. It is confusing to try to explain economic concepts like pass-through without using the word "price." The current language of "the benefits will improve competition in the relevant market" is far less clear than explaining that any purported cost savings must flow through into lower prices paid by end consumers (and the same for quality improvements).

The draft is written to put forward a primary abstract goal, preventing the lessening of competition, and a primary empirical goal, deconcentration. The third paragraph of the document quotes the Clayton Act for the first time, including the term "lessen competition." The sentence immediately following offers the interpretation of that fragment of the statute, namely, "curbing concentration in its incipiency." That sentence serves as an interpretation of the 'lessening competition' concept because of the sentence's positioning directly after the quote from the statute and its place at the end of the paragraph. The reader thus arrives at the end of the third paragraph of the draft understanding that the Agencies' definition of competition is 'curbing concentration in its incipiency.' Nothing else in the introduction offers other interpretations of competition or end goals of merger enforcement.

This is a significant flaw in a document whose job is to describe the economic analysis used in merger review. First, concentration changes for reasons other than mergers and that makes it a problematic object to interpret. But more importantly, concentration is not the end goal of enforcement because people do not care about concentration *per se*. They care about *what they gain* from competition in the market at issue and whether those gains will be reduced as a consequence of that particular merger. Those gains are, at a minimum, price, quality, and innovation for consumers and higher wages for workers. If a definition of competition is too difficult for the Agencies to devise, a workable substitute is an explanation of the outcomes of competition that matter to people. Indeed, it is by seeing those outcomes that we know we have a competitive market. The presence of competition and the absence of market power are what cause firms to give consumers lower prices and workers higher wages. And if the authors of the draft have in mind additional benefits from competition, the paragraph that begins "Across the economy, competition plays out in many ways and on a variety of dimensions" would be the place to list and describe them. Without such content, non-specialist readers will arrive at the bottom of the second page of the Guidelines and still not understand how *they* will benefit from merger enforcement.

The narrative

On multiple occasions I have been exposed to arguments by members of the Biden administration that it is important for antitrust enforcement to be accessible to the people. The idea is that regular people should be able to understand it and participate, while interpretation and enforcement should not be reserved to the elites. If this draft is meant to be accessible to an ordinary person, or even a well-educated person whose specialty is not antitrust, then it needs considerably more work. Much of the content does not make sense unless the reader is well acquainted with past enforcement debates and is sensitive to the

terminology in the field. To appreciate the subtleties and advances in the draft, a reader must have significant legal training (e.g. know the difference between a defense and a rebuttal). As noted above, the draft does not explain how enforcement helps regular households, nor does it make the analysis of mergers relevant for consumers or workers.

The narrative and clarity of the Merger Guidelines matter to more than citizen readers. A court that is reluctant to interfere with a major merger will not be convinced by a legal brief that selectively cites some opinions from the past but offers no explanation for other court decisions that are inconsistent with economic realities and provides no compelling end goals. Those courts will rule the way they prefer -- perhaps by relying on opinions omitted from the draft guidelines and brought forward by defendants. Courts that want to protect people from market power, however, benefit greatly from a clear intellectual roadmap that explains how lessened competition manifests itself. Once those courts understand how competition risks being lessened in their case, have the tools to see it, and have the vocabulary to express it, they can fit the facts of their case into existing law and enjoin harmful mergers. Guidelines that explain simply what methods, metrics, and concepts to use in different situations can prevent an inexperienced court from falling prey to errors encouraged by defendants.

Recommendation

The mashing together of three kinds of content into one document converts what could be a valuable moment to strengthen enforcement into a missed opportunity. The discipline of economics is increasingly able to identify and articulate competition harms, and these advances appear in the draft (e.g. input markets, partial ownership, serial acquisitions, platform economics, and new methods). Furthermore, the empirical evidence that these activities have both harmed competition and are empirically significant is plentiful and accumulating rapidly. The changes to the economics that appear in the draft are strongly justified by the progress of the discipline as well as changes in market realities in the economy. These factors would naturally cause a straightforward revision of the merger guidelines to be a huge hit with the competition community. But that anticipated stature makes it tempting to hitch more material to that wagon -- legal analysis and different goals for example. Unfortunately, that additional baggage weakens the originally strong economic content.

By the time the turducken is assembled, none of its constituent parts is effective any longer. The economics is harder to understand because the way it makes markets help people cannot be described, and it is interlaced with law. The legal brief is awkward because it has to include so much economics and omits discussion and critique of important and misguided cases. The presentation of the non-people centered goals is weakened because of the need to operationalize them through economic analysis that uses the welfare of workers and consumers as its goal. Each of these three pieces would be far more effective on its own. A legal brief explaining how the Agencies will rely on good law while at the same time distinguishing unsound opinions could well be convincing and influential. An explanation of why people directly value deconcentration, local control, organic growth, etc, and the method by which the agency leaders will take that into account in merger enforcement, would be informative. And a document containing only the economic analysis would bring the US Merger Guidelines into the modern era.

II. Comments on the Economics in the draft 2023 Merger Guidelines

The economic advances in the draft cover much-needed new ground in the areas of platforms, labor markets, and methodologies among others. The explanation of the economics is a model of clarity - where it is not interspersed with law – and the Appendix is a thing of beauty. The agency economists have done a very high-quality job here.

The fact that one type of conduct can be categorized under multiple Guidelines will be confusing for attorneys and courts. Lists of conceptual categories are usually mutually exclusive and exhaustive, and they are easy to understand for that reason. Simply stating up front that more than one guideline can apply is not enough to give readers an appreciation of how real life conduct is less neat and organized than a list of guidelines. Examples of conduct that falls in two or three categories would be extremely helpful in overcoming this conceptual block. Overall, the lack of examples in the draft weakens its impact.

Guidelines 6-8

I will confine my comments to a few high-level points as many other scholars have offered detailed suggestions on the text. First, I agree with the choice the drafters made to include guidelines for all types of mergers in one guidance document. Ultimately the concern of enforcement must be the lessening of head-to-head competition for the business of suppliers or consumers, but that can be achieved through a wide range of types of transactions. Creating one overarching analytical framework for all of them limits the ability of merging parties to claim their transaction type must be harmless because it falls in a particular bucket. However, this reasoning again highlights the need for a strong articulation of the end goals of enforcement other than concentration; all non-horizontal transactions will increase concentration in the sense of the size of the corporation in the economy, and no non-horizontal transaction will change concentration in any one market.

The presumption in Guideline 6 can be added to Guideline 5. The foreclosure theory of harm is the same so this combination would be easier to understand.

Guideline 7 appears to be overly expansive. It addresses the horizontal merger concerns already covered in Guidelines 1 and 2 where acquisition of a competitor would surely entrench or extend a dominant position. Likewise, the acquisition of a potential entrant (already covered in Guideline 4) will entrench a dominant position. Guideline 7 also seems to duplicate Guidelines 5 and 6 because the acquisition of an asset that could be used to foreclose or raise rivals' costs could also entrench a dominant position or extend it into an adjacent market. The reader is left wondering what new conduct this guideline is meant to cover that is not already articulated by one of the other guidelines. (And this puzzle is made more difficult to solve by the non-exhaustive and exclusive nature of the list.)

This Guideline could be made useful if it were clear that it is covering the gap that sometimes arises in enforcement when a transaction is not horizontal but also does not involve parties in a direct supply chain. If the transaction does not appear to be "vertical" but also does not involve head-to-head competitors, it can be difficult to analyze, and for that reason parties may claim there is no scope for harm to competition. However, merging parties' businesses may be related to one another within a broader ecosystem of related activities that create strategic interdependence and therefore have the possibility of affecting competition. One firm's business might be a source of data that could impact quality or customer flows to other firms. One firm might be a tool that customers use to multi-home across other businesses. One firm might hold a market position that gives it influence over future standards that will have strategic implications for firms in another part of the ecosystem. And so on.

While this is a useful topic to include in new Merger Guidelines, the current draft of Guideline 7 appears to be broader than the idea above and therefore likely to condemn many more transactions than appropriate. The discussion of entry barriers in part A, for example, implies that any successful action by one competitor that attracts consumers will lessen competition. For example, the customers who buy the better product will almost necessarily reduce the number of consumers buying from the rival, and therefore lessen its scale compared to the scale it would achieve if the first rival had a terrible product. A better product seems likely to be more expensive to imitate and raise the necessary investment of rivals. But making illegal the kind of improvements that attract consumers seems counter to the goal of

protecting markets that serve the people. I suggest placing the non-horizontal subset of this material in Guideline 5 to make it clear that the "vertical" merger category includes all mergers of parties that do not compete head-to-head. Alternatively, the guideline could be rewritten to narrow its focus to the issue of filling what may be the perceived gap described above.

Guideline 8 appears to make illegal the type of industry transition described by John Sutton and others. If technology or demand changes so that fixed costs become a larger part of total costs, then optimal firm size rises, and the industry will support fewer firms. This trend is not something a government can stop, so announcing it is illegal in the United States is quixotic. The trend will not lessen competition if industry participants continue to compete on the bases of attributes generated by the new fixed costs. Of course, careful analysis of mergers in such industries is warranted so that industry participants do not use the trend as an excuse for an anticompetitive merger. For example, when wireless firms began consolidating, those mergers enabled the existence of nation-wide service, something consumers valued greatly. Forcing the industry to remain as many fragmented local services would not have served anyone's interests. Then in 2011 AT&T and T-Mobile, both offering nationwide service, attempted to merge, citing the many beneficial transactions that had preceded their deal as justification. Nonetheless, the transaction was correctly analyzed as anticompetitive by the Division because of the head-to-head nationwide competition between the two companies. Economic analysis revealed that a merger would lead to higher prices, less innovation, and limited, if any, benefits. Today a wireless oligopoly harms consumers due to the 2019 merger of Sprint and T-Mobile, a transaction which was permitted by the Division. (Disclosure: the author worked against both transactions.)

Section 3D says that "efficiencies are not cognizable if they will accelerate a trend toward concentration or vertical integration" and references Guidelines 6 and 8. But if technology is changing such that it makes sense to combine two activities inside one corporation, then the first firm to figure this out will incentivize others to follow. Therefore, those technological shifts will necessarily create a trend toward either concentration (when technology favors economies of scale) or vertical integration (when technology favors economies of scope). Whether a particular merger "accelerates" the trend depends on whether it is a pioneer and shows the way for others, or a laggard engaging in a transaction when the process is mostly played out. Neither enforcing against such mergers, nor punishing the market participant with the most foresight and initiative seems sensible.

Efficiencies

By the time readers arrive at Section 3, they have learned that the merger review will strictly follow the Supreme Court. Therefore, the first sentence of Section 3 reveals that efficiencies will play no role in the analysis. The quotation used is "possible economies from a merger cannot be used as a defense to illegality." If any such economies can be counted at most once, then they must either be used to determine the impact on competition in the initial analysis (the "illegality"), or they are used by defendants after an Agency determination has been made that did not include efficiencies (the "defense"). The quotation indicates the Agencies must use the second approach, while at the same time ruling out the consideration of efficiencies in the second stage. Leading with this quotation therefore causes the reader to understand that efficiencies will *not* be considered in either stage of the analysis.

This conclusion is buttressed by the subsequent two sentences, as well as repeated emphasis on deconcentration as a goal throughout the text. Any merger is a violation under that goal, and no efficiency analysis is needed. However, the section continues with a discussion of merger-specificity, verifiability, and so on, which would only be necessary if the Agencies were, in fact, envisioning a role for efficiencies in merger review. This section is very confusing. If the agencies were intending to include consideration of efficiencies in merger enforcement, this section should be rewritten to explain how that is going to work.

The Benefits of Competition are the Burden of Proof

As noted above, markets improve people's well-being when they deliver lower prices, higher wages, quality, and innovation. The absence from the guidelines of this "trading party welfare" approach stands out. If the phrase "benefits of competition" is meant to include other characteristics of firms such as local control, organic growth, impacts on democracy, and the like, it would be clearer to list those specifically and include in the guidelines the method the agencies will use to assess them. Note that it will be necessary to describe methodology parties and courts should use to measure and trade off these different benefits. For example, suppose a court determines that a merger will lower organic growth but increase innovation. A court would need a method to balance the harms from the lost organic growth against the gains from more innovation. In the current draft the text is general ("benefits of competition"), as if that breadth is needed in order to accommodate new benefits beyond price, quality, and innovation. But there do not appear to be any new benefits in the draft. In fact, there are no mentions to concepts other than price, quality, and innovation. This is a puzzling choice because the vagueness about the benefits of competition makes the text less comprehensible, particularly for non-specialist readers.

It may be that the Agencies have concluded that executing on a goal of benefits for workers and consumers is too difficult under current jurisprudence. Experience may teach that generating and assessing proof of a merger's impact on price, quality, or innovation is something government enforcers are not capable of doing successfully given the current courts, while measuring concentration, by contrast, is possible. If so, using only concentration to establish illegality would enable more vigorous enforcement. This practical strategy - simply change what the government has to prove - may be the reason why the draft ignores the ultimate purpose of merger review and focuses only on concentration, a measurable intermediate outcome. But, if so, this is a significant change in US merger policy and deserves to be highlighted and explained further. In particular, a clear statement of the dilemma in the Merger Guidelines would help readers and courts understand and appreciate the new policy choice.

The policy choice to pursue litigation on the basis of a concentration goal alone has profound implications for the content of the Merger Guidelines. Most of the economic analysis in the draft would not be needed. Furthermore, under a concentration standard most mergers in the United States would likely be considered illegal. This raises the problem that the Agencies do not have the resources to challenge the hundreds or thousands of mergers every year in the United States, nor would that be a good use of the taxpayer's dollar. Agency leadership focused on the welfare of the people will want to know which mergers hurt workers and consumers, rather than choosing among them randomly, or on the basis of political connections or market capitalization, for example. If the most harmful transactions can be identified, then Agency staff can be deployed to challenge them rather than others. However, such a plan would require use of economic analysis.

Perhaps the plan is for the Agencies to use economic analysis to make their internal decisions only. If so, the draft could explain how the economic analysis will be explicitly excluded from, and irrelevant to, any litigation. Alternatively, it could be kept as internal confidential operational guidance. However, this choice does not seem very conducive to business certainty or good government. A better approach would be for the Agencies to share the analytical frameworks they use with the parties and broader community so that they are prepared to make decisions and interact productively with the Agencies.

III. Conclusion

The authors of the draft have put a great deal of material into one document and, not surprisingly, it is unwieldy as a result. There are at least two paths that would yield improvements.

The first is to use the Guidelines to put forward a new solution for current harmful underenforcement. The draft can explain that the Agencies' plan is to divorce the economic analysis from the legal argument in order to take advantage of the ability under the law to enforce against increases in concentration. The draft should be explicit that the reason for the focus on the intermediate outcome of concentration is not that it is accurate in measuring harms, but that the difficulty of proving impacts on price, quality, and innovation to the level that courts demand has prevented the Agencies from blocking harmful mergers. This approach means most of the economic analysis must be removed. Only market definition and the market share limits (HHIs) the agencies plan to use in their assessment of concentration need to be included.

The second, more informative and transparent option is to issue three separate documents that contain the content already developed, thereby freeing each to achieve its goals. This approach would yield the improved economic analysis, a legal brief describing how existing jurisprudence should be used and interpreted by the agencies in enforcement, and a policy statement describing Agency leaders' goals for enforcement and the priorities that result. Each of these pieces of writing could be made strong as well as focused and accessible, and would, in all probability, have lasting impact.